TAMAN PENAWAR SDN. BHD.

v.

KHOO GUAT NGOH & 6 ORS.

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[ORIGINATING MOTION NO. 25-65-94]
4 JANUARY 1995

PRACTICE & PROCEDURE*: Grant of stay of execution - Whether a matter of discretion of Court - Magistrate granting stay pending appeal to High Court - Whether proper - Whether Magistrate acted on correct principles - Intended appeal - Whether a sufficient cause for grant of stay - Special circumstances - Whether to be proved - Subordinate Courts Rules 1980 O. 49 r. 4.*

PRACTICE & PROCEDURE*: Stay of execution - Application to vacate order - Application made by way of originating motion - Whether proper - Whether application to be by way of an appeal.*

This was an application to vacate a stay of execution order granted by the learned Magistrate in respect of judgments obtained by the applicant. The applicant had obtained default judgments against the respondents for vacant possession of certain parcels of land. The respondents applied to set aside the judgments but the application was dismissed by the learned Magistrate. However, while dismissing the application, the learned Magistrate granted the respondents a stay of execution, pending an intended appeal to the High Court by the respondents.

The applicant applied by way of originating motion to vacate the stay order aforesaid. Before the learned Judge the applicant argued that the order in question was wrong in law, and was improperly granted, there being no special or exceptional circumtances shown for the grant of the order. The respondents objected to the mode of the applicant's application, and argued that the applicant ought to have pursued the action by way of an appeal and not by originating motion.

The issues that arose were:

1. Whether in the circumstances herein it was proper for the applicant to move the Court to set aside the said stay order by way of an originating motion, and if so;

2. Whether the Magistrate, in granting the order aforesaid, had exercised her discretion and acted on correct principles.

Held:

[1] It is wholly proper and procedurally correct for the applicant to move this Court by originating motion to set aside the order for stay. The Court has to be even handed when considering matters of procedure that affected both the successful as well as the unsuccessful party in a suit. As it is trite law that a party who is refused stay in the lower Court may yet move the High Court by originating motion for a stay, it would thus be unjust not to allow the aggrieved party who had been prevented by such stay from claiming the fruits of his litigation, to move the High Court by means of a similar procedure. *A fortiori*, when the Court of first instance, as here, has held in the former's favour after having heard the evidence.

[2] By O. 49 r. 4 of the Subordinate Courts Rules 1980, particularly by the words "may" and "sufficient cause being shown" therein, it is clear that though the Court has an absolute and unfettered discretion as to the granting or refusing of a stay, such discretion in favour of a stay may be exercised only if sufficient cause be shown in support thereof. Decided authorities had also firmly established that the discretion should be exercised on correct principles, namely that a stay would only be granted if special circumstances could be shown, and that the intended appeal enjoys a reasonable prospect of success.

[3] In the instant case the learned Magistrate had granted the stay order on the sole ground that the respondents had intended to file an appeal. It was evident that the relevant facts and circumstances in the oral application for stay, necessary for a proper exercise of discretion by the Magistrate, were not at all placed before the Court, either orally or by an affidavit. In the premises the stay order was not decided in accordance with the requirements of O.49 r.4 of the SCR. The order therefore ought to be vacated.

[Application granted].

Obiter dicta:

The proper order that the learned Magistrate could have made in an oral application immediately following judgment is an interim stay of execution, pending a formal application within a specified time, by the party seeking a stay, supported by affidavit on merits. This is because at the time of the oral application the notice of appeal had yet to be filed, and special grounds and merits could more properly be shown only by affidavit evidence rather than solely by Counsel's oral submission.

Cases referred to:
Shanmugam Pillai v. Panjali [1961] 27 MLJ 290 ***(refd)***
Annamalai Chettiar v. Yeoh Kee Tion [1950] 22 MLJ 49 ***(refd)***
A-G v. Emerson [1889] 24 QBD 56, CA ***(refd)***
Becker v. Earl's Court Ltd. [1911] 56 Sol Jo 206, CA ***(refd)***
Barker v. Lavery [1885] 14 QBD 769, CA ***(refd)***
Serangoon Garden Estate Ltd v. Ang Keng [1935] 19 MLJ 116 ***(refd)***
Mohamed Mustafa v. Kandasami(2) [1979] 2 MLJ 126 ***(refd)***
Government of Malaysia v. Datuk Haji Kadir Mohamed Mastan & Anor. application [1973] 3 MLJ 514 ***(refd)***
Re Duke Group Ltd (In LIQ) and the Corporations Law (SA) Gerah Imports Pty. Ltd. v. The Duke Group Ltd (In LIQ) [1994] Vol. 68 ALJR 196 ***(refd)***
Sungei Way Leasing Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & 5 Ors. [1990] 1 CLJ 148 ***(refd)***
Seng Huat Hang Sdn. Bhd. v. Chee Seng & co. Sdn. Bhd. [1986] 1 MLJ 348 ***(refd)***
Drayton Giftware Ltd. v. Varyland Ltd. [1982] 132 NLJ 558 ***(refd)***
Farden v. Richter [1889] 23 QBD 124, 129 ***(refd)***
Lee Suat Hong v. Teo Lye [1988] 2 MLJ 537 ***(refd)***
Khew Ah Bah v. Hong Ah Mye [1971] 2 MLJ 86 ***(refd)***

Legislation referred to:
Court of Judicature Act 1964, s. 29
Rules of the High Court 1980, O. 89 r. 1
Subordinate Courts Rules 1980, O. 49 r. 4

Other sources referred to:
S*upreme Court Practice* [1979] (White Book Vol. 1 p. 66)

For the applicant - V. Thevendran; M/s. Daud, Thevendran & Partners
For the respondents - Chong Woon Khoon; M/s. Chong Woon Khoon

JUDGMENT

Vincent Ng Kim Khoay J:

In the Court below, the respondents had applied to set aside the judgments-in-default obtained by the applicant company in Penang Magistrate's Court Civil Actions Nos. 72-159-94, 72-161-94, 72-162-94, 72-163-94, 72-164-94, 72-165-94 and 72-166-94 (7 cases) respectively and the application was dismissed with costs on 19 October 1994. However, the learned Magistrate then granted the respondents a stay of execution of the said judgments pending the disposal of the respondents' appeal to the High Court. This stay resulted in the current originating motion dated 22 October 1994 (encl. 1) in which the applicant company had applied for an order that the stay of execution granted by the learned Magistrate pending the intended appeal by the respondents, be vacated.

The application was supported by encl. 2, the affidavit of one of the directors of the applicant company Teoh Choon Lye dated 22 October 1994 whereas no affidavit was filed by any of the respondents in answer to encl. 2, despite the fact that when this originating motion first came up for hearing on 26 October 1994, Counsel for the respondents had applied for an adjournment (adjourned to 4 November 1994) for the expressed purpose of filing an affidavit to show merits and special circumstances for a stay of execution.

The applicant's grounds in support of encl. 1 are (*vide* encl. 2) as follows:

1) The intended appeal to be filed by the respondent was devoid of any merits and there were no special or exceptional circumstances to order a stay of execution. This had deprived the applicant company of the fruits of the judgment. All the squatters except the respondents had vacated from the development site and it was the intention of the respondents to frustrate and hamper the applicants' intended development of the relevant site.

2) The applicant company had obtained bridging and end financing facilities of RM12,000,000 and a charge had been created in favour of Hock Thai Finance Berhad.

3) The company had also obtained all relevant plans and had complied with all the requirements for the development of the land concerned including the conditions contained in a letter dated 15 October 1993 issued by Penang City Council to commence work.

4) Due to the unreasonable attitude of the respondents, the company had suffered considerable loss in servicing the said loan and in their commitment to their eighty-five (85) potential purchasers of the property to be developed.

5) The stay of execution pending appeal granted by the learned Magistrate on 19 October 1994 was clearly wrong in law and ought to be vacated.

At the instance of the Court, Counsel for the respondents Mr. Chong raised a point by way of preliminary procedural objection, that the applicant company should pursue their case by way of an appeal, which indeed had been filed by the applicants and not by originating motion. In this regard, the applicant's Counsel, Mr. Thevendran was unable to point to any authority in the applicant's favour, but nevertheless submitted that it was unjust not to allow the applicant to move the Court by originating motion when the respondents were allowed to do so if stay had been refused. He also stressed that the High Court has concurrent and co-ordinate jurisdiction on such matters and if this application is heard, the applicant company's appeal dated 31 October 1994, which was filed because of the 14 days time limit, would automatically abate.

Mr. Chong replied that O. 8 r. 1 only states when a motion can or cannot be used, but does not enable the applicant company to disguise an appeal by way of an application. Also, this Court has no jurisdiction to convert an application into an appeal and the revisionary powers of the Court are normally exercised only in cases where the parties in the Lower Courts had exhausted their remedies.

On the question of whether a party can move the Court by an originating motion to set aside a stay of execution allowed by the Court below, it is my view that:

1) Proceedings to decide whether a stay ought or ought not have been granted in the Court below, should not be considered an appeal as it does not involve consideration of the substantial merits of the appeal on the case proper and could thus be properly decided upon affidavits.

2) The ratio in *Shanmugam Pillai v. Panjali* [1961] 27 MLJ 290 has clearly established the principle that the High Court has concurrent and co-ordinate jurisdiction with the Subordinate Courts on questions of stay. See also *Annamalai Chettiar v. Yeoh Kee Tion* [1950] 22 MLJ 49. Consequently, an application against a decision granting or refusing a stay of execution is not itself an appeal.

3) On the scope of O. 8, the *Supreme Court Practice* [1979] (White Book Vol. 1 p. 66) states that proceedings by originating motion are, in the main, applications and appeals to the High Court under various statutes, and where procedure is not specified, "an originating motion is the appropriate means of approaching the Court." We also ought to bear in mind that the procedure for approaching the Court when stay of execution is refused by the subordinate Court in as much as the procedure that the other party is to adopt when stay is allowed to a party are both similarly not specified.

4) Although the decision in *Annamalai Chettiar* (*supra*) concerned an application to the High Court by the applicant for a stay of execution (without having first made a similar application in the Court below) and is not wholly pertinent to the issue here, yet therein it was held that the High Court is not only clothed with alternative or co-ordinate jurisdiction on matters of application for stay but that a motion in the appellate Court is not an appeal. Hence, s. 29 of the Court of Judicature Act 1964 which provides that all civil appeals are by way of rehearing is inapplicable in an application to the High Court for stay or to vacate an order for stay of execution granted in the Subordinate Courts.

5) As it is trite law that a party who is refused stay in the lower Court may yet move the High Court by originating motion for a stay, it would thus be unjust not to allow the aggrieved party who had been prevented by such stay from claiming the fruits of his litigation to move the High Court by means of a similar procedure. It is axiomatic that Courts have to be even handed when considering such matters of procedure *vis-a-vis* the successful as well as the unsuccessful party in the suit or action. It ought to be noted that a litigant's right to the fruits of his litigation is as valid and imperative as the opponent's right to the maintenance of *status quo* pending appeal, a *fortiori*, when the Court of first instance has held in the former's favour after having heard the evidence.

6) Refusal of a stay is as much a decision on the part of the presiding Magistrate after having heard the parties, as the granting of a stay.

For all the above six compelling reasons taken collectively I overruled the respondents' preliminary objection and hold that it is wholly proper and procedurally correct for the applicant to move this Court by originating motion to set aside the said order for stay. By the same token I can see no reason why an aggrieved respondent in a stay of execution granted to an applicant by a Judge after trial at High Court level could not, similarly by originating motion move the Court of Appeal to vacate the order of stay.

I now turn to the merits of the stay granted by the learned Magistrate. The applicant's Counsel Mr. Thevendran admitted that as soon as the application to set aside the JID was refused by the Magistrate the stay was granted. The Magistrate had correctly dismissed the respondents' application to set aside the JID but had allowed a stay of execution when neither "sufficient cause" nor special circumstances were presented before the Court and the appeal itself was devoid of any merits. He said that the Court has to be mindful that an appeal does not operate as a stay and the respondents had not shown any probability of succeeding in their appeal from the learned Magistrate's decision. Mr. Thevendran further said that stay of execution is discretionary and has to be exercised on proper judicial principles and not on sympathies.

The respondents' Counsel, Mr. Chong conceded that he had not filed any affidavit in reply to encl. 2 herein. He also agreed that the respondents had not filed any affidavit to explain their absence from Court at the trial of the matter on 29 June 1994 when JID was given.

On the question of whether the learned Magistrate was right in granting a stay of execution, it is perhaps essential to set out the chronology of events in the Court below.

On 25 March 1994 the Court fixed the trial of the above civil actions (agreed to be heard together) on 29 June 1994. On 10 June 1994 the applicant's application under O. 14 r. 21(1) or alternatively under O. 26A of the Subordinate Courts Rules to strike out the defence and enter summary judgment, was heard and dismissed with cost to the respondents on 22 June 1994.

On 29 June 1994 judgment in default was entered by the learned Magistrate in favour of the plaintiff because neither the respondents nor their Counsel was present on that day. The applicant's solicitor then applied on 25 July 1994 for leave to issue execution proceedings i.e., for the respondents to surrender vacant possession of their premises, and leave was granted on 9 August 1994. On 6 July 1994 the respondents filed their applications to set aside the judgments in default dated 29 June 1994. This application was supported only by the affidavit of Counsel for the respondents, Mr. Chong and it was heard on 15 October 1994 and dismissed on 19 October 1994 with costs. Immediately upon dismissal of the said applications, the learned Magistrate ordered a stay of the writ of execution pending the then intended appeal to the High Court by the respondents.

Order 49 r. 4 of the Subordinate Courts rules 1980 states:

> The filing of a notice of appeal shall not operate as a stay of execution, but the Court **may** on application **and on sufficient cause being shown** stay execution on such terms as it may think fit. (Emphasis added)

The vital phrase in this provision is "**may**...and on **sufficient cause being shown**." This phrase makes it crystal clear that though the Court has an absolute and unfettered discretion as to the granting or refusing of a stay, such discretion in favour of a stay may be exercised only if sufficient cause is shown in support thereof, which must be deposed to on affidavit, unless the application is made at the hearing. See *A-G v. Emerson* [1889] 24 QBD 56, CA; *Becker v. Earl's Court Ltd.* [1911] 56 Sol Jo 206, CA; *Barker v. Lavery* [1885] 14 QBD 769, CA. And

it has been firmly established in *Serangoon Garden Estate Ltd v. Ang keng* [1935] 19 MLJ 116, *Mohamed Mustafa v. Kandasami(2)* [1979] 2 MLJ 126 and *Government of Malaysia v. Datuk Haji Kadir Mohamed Mastan & anor. application* [1973] 3 MLJ 514 that the discretion should be exercised on correct principles, namely that a stay would only be granted if special circumstances could be shown, and the intended appeal enjoys a reasonable prospect of success. See also *Re Duke Group Ltd. (In LIQ) and the Corporations Law (SA) Gerah Imports Pty. Ltd. v. The Duke Group Ltd. (In LIQ)* [1994] Vol. 68 Australian Law Journal Report (ALJR) p. 196.

In the current matter, the learned Magistrate had on 19 October 1994 granted a stay of execution on the oral application of the respondents' Counsel merely on the sole ground that his clients had intended to file appeal. The relevant facts and circumstances in the oral application for stay was not at all or properly placed before the Court either orally or by an affidavit. This is necessary if the learned Magistrate's discretion is to be exercised according to the requirement under O. 49 r. 4 of the Subordinate Courts Rules 1980. See *Sungei Way Leasing Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & 5 Ors.* [1990] 1 CLJ 148. It is clear from the records that though the application for stay was made orally, Counsel had not submitted even orally, any grounds to persuade the learned Magistrate to exercise her discretion in the respondents favour for an order of stay. As such, from the records and the submissions of Counsel before me, the learned Magistrate would appear to have made the order for stay of execution automatically, immediately following her decision to dismiss the application to set aside the said judgment in default. Thus, as the provisions of O. 49 r. 4 clearly places a duty on the Magistrate to show that she had exercised her discretion "on sufficient cause being shown", and - by virtue of the aforesaid binding authorities - on correct principles, her records must essentially reflect the special circumstances that she had considered. Unfortunately here, the records were totally silent on the reasons upon which she had exercised her discretion in favour of the respondents in allowing the stay of execution. At any rate, the proper order that she could have made in an oral application (if warranted) immediately following judgment is an interim stay of execution, pending a formal application within a specified time, by the party seeking a stay, supported by affidavit on merits. This is because at the time of the oral application the Notice of Appeal had yet to be filed, and special grounds and merits could more properly be shown only by affidavit evidence rather than solely by Counsel's oral submission. The other reason is practical: as it is not an uncommon view among legal practitioners that it is often difficult to persuade the presiding Magistrate or Judge that there are merits in the intended appeal it may serve the interests of justice to reduce their application to writing; especially hereafter, following my ruling in this matter that both parties in the outcome of a stay application may move the higher Court through the expeditious process of an originating motion.

In the event, I held that the stay allowed by the Magistrate was not decided in accordance with the requirements of O. 49 r. 4 of the Subordinate Courts Rules 1980 and should be vacated. Furthermore, this originating motion is supported by an affidavit from the applicant company (encl. 2), to which none of the respondents had filed any affidavit in reply to show that the learned Magistrate was correct in granting the stay. However, I allowed the applicant company's application on the terms of encl. 1 herein and set aside the order of stay dated 19 October 1994 in respect of all the aforesaid civil actions. The applicant shall also be entitled to the costs of this application. And, at the request of the respondents, I allowed them a grace period of two months from date of my decision on 4 November 1994 to vacate the respective premises.

Also, Counsel for the applicant company had also submitted that the Magistrate had correctly refused to set aside the judgment in default because:

i) it was common ground that neither the respondents nor their Counsel Mr. Chong was present in Court at the hearing of the matter fixed for 29 June 1994, and that date was a hearing date;

ii) it was also not in dispute that none of the respondents had affirmed or filed any affidavits to explain their absence from Court on that hearing date, and neither was there any affidavit from the Counsel (one Mr. K.H. Chua) who was allegedly instructed but failed to appear on behalf of Mr. Chong on 29 June 1994 to secure an adjournment of the matter;

iii) upon the principles enunciated in *Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1986] 1 MLJ 348 where it was held by Edgar Joseph Jr. (as he then was) that even in a case where judgment in default had been obtained, it would still be crucial, in applications to set aside such judgment, not only to place before the Court at least some evidence of *prima facie* defence to the plaintiff's claim (see also *Drayton Giftware Ltd. v. Varyland Ltd.* [1982] 132 NLJ 558 and also *Farden v. Richter* [1889] 23 QBD 124, 129), but he also ruled that affidavit of merits must be produced in Court by the applicant himself to satisfy the Court that he has a *prima facie* defence. His Lordship had this to say:

> With respect, in matters where disputed questions of facts are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto: see *Million Group Credits Sdn. Bhd. v. Lee Shoo Khoon & Ors.* [1986] 1 MLJ 315.
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> In my opinion therefore, neither Counsel's affidavit nor the statement of defence was evidence showing a *prima facie* defence within the meaning of *Evans v. Bartlam* [1937] AC 473. A trite point, perhaps, but a crucial factor which was overlooked all round both here and in the Court below.

Though, I am also of the view that for the above reasons the learned Magistrate had quite rightly refused to exercise her discretion to set aside the JID, yet this issue is only pertinent to the appeal that is to be heard, whereas the Court's function here is merely twofold: firstly, to decide on the procedural issue aforesaid and secondly, to decide whether or not the learned Magistrate had exercised her discretion in granting the stay on correct principles.

As the aforesaid procedural point has generated some considerable interest among legal practitioners here, the Court of Appeal has rightly allowed the respondents leave to appeal against this decision.

I am constrained to say in postscript, that, as Counsel for the applicant company had submitted that the delay in the resolution of this matter has cost the applicant company to lose over RM100,000 per mensem on their loan of RM12,000,000 from Hock Thai Finance to develop the land concerned, wherefrom virtually "all the squatters" (presumably after having received compensation) save the respondents had vacated, I have taken pains to complete this written judgment promptly after my secretary received the notice of appeal on 28 December 1994. Indeed, soon after my decision on 4 November 1994 the applicants had written to my Court seeking an early date for hearing of the respondents' appeal proper. When both lawyers later came before me to settle the draft of the order made herein, I intimated to them that if the relevant appeals belong to my Court records (otherwise with the consent of the learned Judge concerned), I would be prepared to consider fixing an early date for hearing of the appeal, in order to avoid the necessity for further stay of execution pending the appeal

- which could nevertheless proceed on its academic content. However, Mr. Chong for the respondents was unhappy with this suggestion and it was laid to rest when we later discovered that the relevant appeals were filed in the Civil Division of another High Court.

Regretfully, the impression conveyed to the Court by this, is that there lurks an apparent ongoing attempt on the part of the respondents to delay the resolution of the matter, perhaps for the purpose of securing higher compensation by bringing the applicant company to heal through Court process.

Indeed, it is no uncommon for this Court to come across cases of exorbitant demands for compensation against developers from land occupiers (who are squatters or otherwise) which, adversely from the societal point of view, may perhaps have in part contributed to the very high prices of property in Penang. Aptly illustrative of this common phenomenon in Penang is a case reported in this morning's (4 January 1995) issue of The New Straits Times, where my brother Judge, Dato' Abdul Hamid Mohamed J had ruled that the land occupiers/ defendants held no equity in the land concerned and declared them as mere squatters, yet it was revealed in the course of the hearing in that Court that the developer had offered each of the defendants RM90,000 compensation for vacant possession of the land whereas the defendants had demanded RM200,000 compensation each. Notably, just only about two weeks ago I had occasion to hear an application for possession of land wherein the defendant had claimed in his affidavit that he was clothed with equity on the land concerned, as the plaintiff's father had allowed his father (deceased) to build a semi-wooden house (now occupied by him) on the land many years before, free of any land rents or other consideration. He also alleged that the plaintiff's father had orally promised to allow his father to squat upon the land for as long as the latter desired. At the hearing of the plaintiff's application under O. 89 r. 1 of the Rules of the High Court, and as it was common ground that the land occupation was free of any monetary consideration paid to the plaintiff, I posed the following four questions to the defendant's Counsel as soon as he sat down in my Chambers, and I said: "Could Equity be foisted upon the progeny of a man who has performed an act of charity? Is Equity anathema or alien to altruism? Could Equity compel a continuation or enlargement of or penalise an act of charity? Having, for so many years enjoyed gratis, the fruits of what is not his land, could the defendant yet assert that equity born of estoppel (if at all he had any) had not thereby extinguished? Perhaps not, though it has been said that the law is an ass - but certainly an interesting judgment to write should your client pursue his defence." Whereupon, Counsel for the defendants promptly requested for an adjournment of the matter to enable him to advise his client to effect settlement. To muse: Equity herself in this aspect, is under pressure to emerge from her conservative shell and to acclimatise with the changing circumstances in the present day society which has metamorphosed from an onerous, peasant or bonded-labour based society with scarce opportunities for the wherewithal of survival and in dire need of protection, into an industrial worker-shortage society where workmen are armed with great command of good value for their labour.

Hence, at almost every chamber-day hearing in our Courts here, the lot is upon the Judge to steer an equitable and fair path between the importunate requirements of developers - some manifestly rapacious - and the cynical demands of some opportunistic land occupiers; nay, often through strenuous and far-fetched assertion for a liberal interpretation by the Courts to the effect that they are clothed with "equity to be compensated". On the one hand we have the financial clout of the landowners, squarely pitted on the other hand against the time commodity that the land occupiers - through the use of the Courts - had to offer; and the consumer who acquires its end-product would have to pay dearly for this financial skirmish. Evidently, some lawyers who advise their clients (not necessarily in the current

case) are callous to the social consequences of their client's actions - to a Judge, the hands in the scales of justice are eternally ambidextrous. As Counsel act for fees, it is left to the Courts to act resolutely as guardians of the law and society.

It is precisely arising out of this public interest consideration that O. 89 r. 1, which is commonly employed to evict such land occupiers, is clearly intended by the legislature to provide the developer or person who claims possession of land with a summary procedure (by originating summons) to reclaim possession. Thus, for speedy disposal of such matters it is perhaps advisable for the plaintiff to plead in the alternative and to have the value of the equity assessed by a report from a reputable property valuer. He could then submit this report to the Court at the hearing of the originating summons, to enable a prompt decision or an expeditious hearing date to be fixed (of say two to three weeks and not the normal two to umpteen years) in the event that the Court holds that there are triable issues due to *prima facie* equity disclosed in the affidavits. It is also essential for this valuation report to be forwarded to the defendant's Counsel well before the summary hearing of the summons, to enable him where appropriate, to challenge the valuation report by submitting a counter-valuation report. See also *Lee Suat Hong v. Teo Lye* [1988] 2 MLJ 537 and *Khew Ah Bah v. Hong Ah Mye* [1971] 2 MLJ 86. This being an eminently suitable case for the Court to exercise its discretion under O. 28 r. 8 of the Rules of the High Court, 1980 for conversion into writ-action, and a very short hearing date could then be fixed for the disposal of the triable issues, comprising only two simple issues namely:

(a) had the defendant any equity; and

(b) the value of the equity - which includes evaluation of several factors, though certainly not including the value of the land itself.